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THE ROLE OF FEMINIST JURISPRUDENCE IN LEGAL THOUGT

Laila Muhammad Rasyid
Georg-August-Universität Göttingen, Germany
Email: l.muhammadrasyid@stud.uni-goettingen.de

Fanny Tasyfia Mahdy
Universitas Islam Negeri (UIN) Ar-Raniry, Banda Aceh
Email: fannyalways@gmail.com

Abstract

This research aims to study the feminist concept as an entity in the process of forming a view of law and justice. With a normative - sociological approach, where data is obtained from the study of legal texts, expert opinions, and various other sources related to this topic. The results of the study show that the birth of male dominance in the thought process of legal formation, because male groups have misunderstood or biased in constructing the concept of man. According to feminists, legal structures are created by men and reinforce male values. By stating that the male group is the norm. Conversely, women are deviations from the norm and this is hegemony in the concept and reinforcement of patriarchal law and power. Feminists challenge and dismantle the belief or myth that men and women are so different, that certain behaviours can be distinguished on the basis of gender differences. Gender according to feminists is socially created or moulded not biologically. Sex determines physical appearance, reproductive capacity, but does not determine psychological, moral or social traits. Feminist legal theory or Feminist jurisprudence is a legal philosophy based on gender equality in the political, economic and social fields.

Keywords: Feminist, Gender, Jurisprudence, Legal Thought, and Islamic Law

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Abstrak

Penelitian ini bertujuan untuk mengkajij konsep feminist sebagai entitas dalam proses pembentukan suatu pandangan hukum dan keadilan. Dengan pendekatan normative – sosiologis, dimana data diperoleh dari hasil kajian terhadap text-text hukum, pendapat ahli, dan berbagai sumber lainnya yang terkait dengan topik ini. Hasil penelitian menunjukkan bahwa lahirnya dominasi laki-laki dalam proses pemikiran pembentukan hukum, karena kelompok pria telah salah memahami atau bias dalam menskontruksikan konsep manusia. Menurut kelompok feminis, struktur hukum diciptakan oleh kaum pria dan memperkuat nilai ke pria-an. Dengan menyatakan bahwa kelompok pria sebagai norma. Sebaliknya wanita adalah deviasi dari norma dan hal ini merupakan hegomoni dalam konsep dan penguatan hukum dan kekuasaan patriakal. Kaum Feminists menantang dan membongkar kepercayaan atau mitos bahwa pria dan wanita begitu berbeda, sehingga perilaku tertentu bisa dibedakan atas dasar perbedaan gender. Gender menurut kaum feminist diciptakan atau dibentuk secara sosial bukan secara biologis. Jenis kelamin menentukan penampilan fisik, kapasitas reproduksi, tetapi tidak menentukan ciri-ciri psikologis, moral atau sosial. Feminist legal theory atau Feminist jurisprudence atau pendekatan hukum berperspektif wanita adalah sebuah falsafah hukum yang didasarkan pada kesetaraan gender dibidang politik, ekonomi dan sosial.

Keywords: Feminim, Gender, Jurisprudence, Pemikiran Hukum, dan Hukum Islam

INTRODUCTION

The debate concerning the status of women dates back to the Ancient Greeks. Plato and Aristotle both sough to analyse the actual and appropriate role of women in society and from their writings may be discerned many of ideas which continue to exercise feminist scholarship. In Ancient Greek thought: the concepts of public and private life which are allegedly distinguishable, with the confinement of women to the private sphere,

considerations of equality based on gender; the concept of patriarchal ownership of, and/or authority and power over women.[1]

However, it is eighteenth, nineteenth and early twentieth century feminist campaigns for the elimination of discriminatory laws which prevented women from participating fully in civic life which mark the origins of contemporary feminist thought.[2] The struggle for the franchise and the battle to be admitted to universities and the professions represented a seminally important, and ultimately largely successful, campaign on which subsequent work towards the full emancipation of women in society was founded.[3]

In Europe, the First World War, the depressions of inter-war years, the Second World War and the subsequent struggle for economic recovery and the rebuilding of a viable peaceful society, resulted in a quiet phase for feminist endeavours, with one principal exception: in the United Kingdom the struggle for the vote for women over the age 30 was finally achieved in 1918, and the full franchise for women on a basis of equality with men in 1928.[4]

Also, in 1949, Simone de Beauvoir's seminal work, *The Second Sex*, was published and the movement revitalized. Simone de Beauvoir's work still forms a foundation for much feminist analysis and a focus for differing approaches to the question of gender and its significance. The core theme running through de Beauvoir means that the construction of society, of language, thought, religion and of the family all rests on assumption that the world is male. It is men who control the meaning given to society: man is the standard against which all is judged. Women, on other hand, are excluded from these constructions, through nurturance and socialization, a female child learns to become a woman. Women, de Beauvoir argues, are socially constructed rather than biologically determined: "One is not born, but rather

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[1] Hilaire Barnett, *Introduction to Feminist Jurisprudence* (London: Routledge, 2013).
[2] Dina Afrianty, *Women and Sharia Law in Northern Indonesia: Local Women's NGOs and the Reform of Islamic Law in Aceh* (Routledge, 2015).
[3] Martha Fineman and Martha T. McCluskey, *Feminism, Media, and the Law* (London: Oxford University Press, 1997).
[4] Iwandi Iwandi, Rustam Efendi, and Chairul Fahmi, 'THE CONCEPT OF FRANCHISING IN THE INDONESIAN'S CIVIL LAW AND ISLAM', *Al-Mudharabah: Jurnal Ekonomi Dan Keuangan Syariah* 4, no. 2 (29 September 2023): 14–39, https://doi.org/10.22373/al-mudharabah.v5i2.3409.

becomes, a woman." Being a woman- the other is reflected in law's construction. law is male; the subject of law is male.[5]

The categories of Self and Other, de Beauvoir instruct, are as 'primordial as consciousness itself.' In all societies, there exists the essential and the inessential; the Self and Other, and all societies reflect this duality. Considering this phenomenon in relation to law, it can be seen that traditionally law has been a male construct and that the subject of law is male. Women, being the other, have been for long at worst oppressed, and at best ignored by the law. For women to be included as subject of law, their voices have to be listened to and, more importantly, to be heard and acted upon. For too long the law, legal theory and jurisprudence has presented itself as a rational objective ordering of gender-neutral persons, while at the same time subconsciously addressing only the essential male.[6]

Feminist scholars in the liberating 1960s were dedicated to the political struggle for the equality of women in the family, in the work place and in politics. By identifying sites of exclusion and oppression, feminist scholars, whether writing from a social or political science or philosophical base, demonstrated further the supremacy which men have traditionally assumed and maintained in society.[7] Feminist legal scholarship became natural and integral part of this movement, although lagging behind the general movement. Feminist jurisprudence is both simultaneously challenging and alternative, and reflects the demands of women- irrespective of race, class, age, or ability- to be recognized as an equal party to the social contract which is underpinned by law and legal systems.[8]

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[5] Sonny Dewi Judiasih et al., 'WOMEN, LAW AND POLICY: CHILD MARRIAGE PRACTICES IN INDONESIA', *NOTARIIL Jurnal Kenotariatan* 3, no. 1 (6 July 2018): 47–55, https://doi.org/10.22225/jn.3.1.647.47-55.
[6] Chairul Fahmi, 'THE DUTCH COLONIAL ECONOMIC'S POLICY ON NATIVES LAND PROPERTY OF INDONESIA', *PETITA: JURNAL KAJIAN ILMU HUKUM DAN SYARIAH* 5, no. 2 (1 November 2020): 105–20, https://doi.org/10.22373/petita.v5i2.99.
[7] Ova Uswatun Nadia and Chairul Fahmi, 'COMPENSATION ON COPYRIGHT DUPLICATION IN PERSPECTIVE OF THE CONCEPT OF ḤAQ AL-IBTIKÂR: A STUDY ON PT ERLANGGA BANDA ACEH CITY', *JURISTA: Jurnal Hukum Dan Keadilan* 4, no. 2 (20 December 2020): 77–145, https://doi.org/10.1234/jurista.v4i2.27.
[8] Kyle Bagwell and Robert W Staiger, 'Reciprocity, Non-Discrimination and Preferential Agreements in the Multilateral Trading System', n.d., 45.

One aspect of feminist scholarship-whether engaged in form a political or legal perspective- seeks to understand and to develop a secure theoretical base of knowledge from which to press for reform. Other scholars have long been, and remain, primarily concerned with the analysis of specific inequalities based on gender. Thus, for example, the criminal justice system, the law relating to the family, employment law and other substantive areas of law form the focus for study with a view to the eradication of often subtle but pervasive gender-based inequalities.[9]

Feminist legal scholarship is frequently presented as having differing phases or waves, although none of these is totally distinct or isolated from other phases. First phase feminism which may be dated from mid Victorian times to the present time, although most vociferous from the 1960s through to the mid 1980s, is dedicated to unmasking the features which exclude women from public life. First phase feminist work within the existing system in order to remove the inequalities of the system, without necessarily questioning the system itself. This liberally inspired enterprise undertaken by the women's right movement accepted law as traditionally portrayed: the rational, objective, fair, gender-neutral arbiter in dispute over right which applied to undifferentiated but individual and autonomous legal subject. The objections voiced by feminists in this phase was to not law *per se* but to 'bad law': law which operated to the exclusion or detriment of women.

Second phase feminism, which dominated the late 1970s and 1980s, addressed not so much the substantive (legal) inequalities under which women exist- although these remain a focus for action- but rather the legal and societal structure which perpetuates in inequalities. Here the focus is less on the male monopoly of law and the correlative inequalities of women, but on understanding, "the deep-seated male orientation which infects all its practices." first phase feminist had made many remarkable advances for

[9] Asian Journal of Law And Humanity and Syarifa Khasna, 'From Discrimination Towards The Justice Of Law (A Study Of Marriage Registration For Adherent Of Belief)', *Asian Journal of Law and Humanity* 1, no. 1 (13 December 2021): 107–14, https://doi.org/10.28918/ajlh.v1i1.5282.

female inequality. However, despite this achievement, it remained the case that women were treated differently and discriminated against.[10]

In other hand, the analyses- and there is no single or simple analysis of this work – centres on the construction of the society as patriarchal in its broadest sense. Radical feminist, In the other statement by Radical feminist, Marxist/socialist feminists, all- in their differing manner-focus not only on specific inequalities supported by law, but also the societal structure which forms the foundation of law. Cultural, or difference feminism, on the other hand, focuses more specifically on the gender issue- on women's difference from men- and its ramifications.[11]

Third phase feminism goes beyond the analysis of law as monopoly, and questions law's claims to be objectivity and rationality: "….by maintaining the appearance of dispassionate neutrality, law is able quietly to go about its task of assisting in the reproduction of the conditions which subordinate women (as well as other social groups)."

Third phase feminism, while accepting the premise of law's maleness, questions whether- as second phase feminist submitted- law and legal systems operate in an *invariably* sexiest manner. The perception of third phase feminists is that while law of gendered, and deeply so, this does not necessarily mean that law operates consistently, inevitably or uniformly to promote male interest. Rather, law is too complicated a phenomenon to be portrayed in this holistic manner. What needs to be understood, from this perspective, is manner in which law responds to differing problems, and in its operation reveals its well concealed gender bias. The approach of third phase feminists is one which necessarily rejects the "grand theories" of second phase feminism: law in reflection of the society it serves, is as complex as that society.[12]

The dominant current phase of feminist thought reflects both the rejection of 'grand theory' and the uncertainties and doubts concerning the role of law. Arising out the late 1980s and continuing through the 1990s, feminists adopt postmodernist philosophy which questions all 'meta-narrative' and denies the validity of global explanations. Postmodernist political and social

[10] Barnett, *Introduction to Feminist Jurisprudence*.
[11] Ulrich Beyerlin, 'International Law', n.d.
[12] Yesmil Anwar and Adang, *Pengantar Sosiologi Hukum* (Jakarta: Grasindo, 2008).

theory is beset with doubt, uncertainly and fragmentation. Grand theorizing, whether in the form of liberalism or Marxist-socialist theory falls under attack, as do feminist theories which espouse monocausal explanations of women's inequalities.[13]

There are many arguments and perspectives for feminist jurisprudence, and also plenty of scholar's argue in the different define and work for feminist jurisprudence. The different argument because, base of phenomenon on women is different each other in the world. And will discuss it deeply in toward discussions.

FINDING AND DISCUSSION

The Feminist Gender Debate

While the aims and objectives of all feminist legal scholars are directed constantly toward the understanding of, and removal of, inequalities and discriminations supported by law, as with any philosophical, political or legal movement differing approaches towards the subject can be discerned. The diversity within feminist jurisprudence- as with mainstream feminism-has significant implications for the analysis of women's condition in law and society.[14] One of the most vociferous debates has taken place between feminist on perceptions about the nature of society, law and legal system and the implications these bear for women's equality[15]. Equally powerful has been the debate about gender, the analyses of the equality, sameness, and/or difference of women from men and, more crucially, the difference that gender makes. This debate, which dominated the 1980s, emphasizes the breadth of feminist scholarship while at the same time suggesting an incredible and inevitable

[13] Liew Kai Khiun, *Liberalizing, Feminizing and Popularizing Health Communications in Asia* (London: Routledge, 2016).
[14] Chairul Fahmi, 'The Impact of Regulation on Islamic Financial Institutions Toward the Monopolistic Practices in the Banking Industrial in Aceh, Indonesia', *Jurnal Ilmiah Peuradeun* 11, no. 2 (30 May 2023): 667–86, https://doi.org/10.26811/peuradeun.v11i2.923.
[15] Muhammad Baqir As-Sadr, *Lessons in Islamic Jurisprudence* (USA: Simon and Schuster, 2014).

diversity within feminist jurisprudence. Gender has been, and remains, an organizing focus for feminist analysis. The gender question is thus central to all school of feminist thought, whether liberal, Marxist-socialist, cultural radical or postmodern.[16]

Woman as 'Other'

The idea of woman as 'the Other' is representative of linguistic analysis which is premised on binary opposites. Each concept in language contains within itself a primary and subordinate characteristic. The meaning of a word cannot correctly be understood unless both the primary meaning and its (silent) opposite is considered. Thus, to understand the word 'presence' an understanding of its opposite, 'absence' must be incorporated. When considering the term 'masculine', its oppositional 'feminine' must be incorporated; for 'man', 'woman'; for 'universality', 'specificity'; for 'unity', 'diversity'. Each term thus contains a binary opposite. In the analysis of poststructuralist Jacques Derrida, these opposites are both interdependent and hierarchically arranged, with the leading term being superior, the opposite being inferior and weaker. In order to fully comprehend the meaning of words and concepts, they must be deconstructed in order to tease out these oppositions.[17]

From this perspective, 'woman' is socially constructed in relation to, and as inferior to, the superior male. The man- who from infancy has been nurtured to assume an unquestioned superiority – defines women's role, creates and maintains a mythology of woman based on her femininity, weakness and subordination to his power.[18]

Thus far, 'woman' is defined as a socially constructed individual, differentiated from man. The characterization of 'woman' in the linguistic tradition of binary opposites, as the polar opposite to man, represent woman

[16] Muhammad Khalid Masud, '"Classical" Islamic Legal Theory as Ideology: Nasr Abu Zayd's Study of al-Shafiʿi's al-Risala', in *Islamic Studies in the Twenty-First Century*, ed. Léon Buskens and Annemarie van Sandwijk, Transformations and Continuities (Amsterdam University Press, 2016), 183–204, https://doi.org/10.2307/j.ctt1zxsk97.12.
[17] *Ibid.*,
[18] Fineman and McCluskey, *Feminism, Media, and the Law*.

as the alternative, 'weaker', 'Other', whose identity can only be determined in relation to the more powerful construct 'man' which stand as a referent for 'woman'.[19] The concept of woman as other explains much of the traditional and continuing stereotyping of women as the bearers of children, the nurturers of children, the homemakers and (unpaid) home keepers. The categorization based on sex facilitates the perpetuation of low expectations of and for women; explains the lesser involvement in all aspects of the workforce; the lower pay; the concentration in part time employment; the lesser chances of promotion- that glass ceiling through which so many women fail to pass. Society- or those with power in society – constructs gender by adopting the physical and psychological distinctions between men and women. Law, being largely the reflection of society, adopts the social construction of gender and translates it into legal norms.[20]

In the course of the struggle for social and legal equality, the gender question was, predominantly in late 1970s and 1980s, placed centre stage in feminist debate, especially in Unites States of America. While liberal feminists' primary focus had been on removing the liberal democratic State, others turned attention on the analysis of the maintenance of women's inferior position within the patriarchal state.[21]

While the distinction between 'sex' and 'gender' has provided and proven to be a useful tool for analysis for feminist scholarship – most particularly in modern thought – a postmodern deconstructionist analysis of gender reveals its own complexities and the disutility of the very term in socio-political and legal analysis.[22] The consequences of gender identity are conceptually very different from the question as to how women are socially and legally constructed. Much of the feminist debate in the 1970s and 1980s, which focused of the analysis of women's 'sameness' or 'difference' (to/ from

[19]*Ibid*., p. 15.
[20] Katherine Bartlett, *Feminist Legal Theory: Readings In Law And Gender* (London: Routledge, 2018).
[21] John R. Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge, UK ; New York, NY: Cambridge University Press, 2003).
[22] Bartlett, *Feminist Legal Theory*.

men), concentrating on the issue of the whether and how men and women are 'different' or 'equal' or 'the same'.[23]

At the heart of the gender debate lie the questions 'what difference– if any- does gender difference make?' and 'to what does gender difference make a difference?' In the third century BC, Aristotle formulated his central concept of justice: namely that equal cases should be treated alike, and that unequal cases should be treated differently. In case of women, it will be seen, this doctrine has had the effect of treating women not only differently, but as second-class citizen. On the other hand, the gender 'sameness versus difference' debate is both important and inevitable in the pursuit of an understanding as to why society, and in the movement towards the eradication of the discrimination endured by women over the centuries. Understanding the 'difference that difference make' has also facilitated analysis of the manner in which the operation of law is critically affected by gender difference.[24]

Differing school of feminist thought, considered in Part III, adopt differing approaches to the issue of gender.

1. **Liberal Feminist**
   Gender *per se,* is theoretically unproblematic: what is required is the removal of such formal legal inequalities which bar women from entering public life on the basis of full equality.[25]

2. **Marxist-socialist Feminist**
   Adopt Marxist political philosophy and accordingly theorise women's inequality within the context of class stratification. Difference, or cultural, feminist theory, on the other hand, albeit in differing ways, focuses on the perception that women and men have differing modes of reasoning, and different socially-constructed roles, which are explanatory of women's inferiority and exclusion from the gendered, male, world.[26]

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[23] Carol Smart, *Feminism and the Power of Law* (London & New York: Routledge, 2002).
[24] *Ibid.*, Hilaire Barnett, *Introduction To Feminist Jurisprudence*, h17.
[25] Bartlett, *Feminist Legal Theory*.
[26] Ann Scales, *Legal Feminism: Activism, Lawyering, and Legal Theory* (USA: NYU Press, 2006).

3. **Catharine MacKinnon Jurisprudence**
   By contrast, radical feminism, epitomized by Catharine MacKinnon jurisprudence, conceptualizes the question of gender in the light of power relationship, and the disparity of power between men and women, supported by law and society. From this perception, woman's role is determined by her socially constructed gender, which ensures her inequality and subordination in relation to law and society which is characterized by male dominance.[27]

4. **Postmodern Feminist**
   Alternatively, in postmodern feminist thought, the gender question is altogether more complex and uncertain. As seen above, postmodern feminist thought rejects any form of universalizing theory, including theories of gender. Gender thus becomes a site of contestation, not only as to its interpretation, but also as to its significance in legal and social theory. The deconstruction of gender, and the rejection of totalizing theories, lead to an understanding both of the indeterminacy and fragility of the very concept of gender, and of the need for feminist jurisprudence to avoid theory which adopts an essentialist view of woman as its focus.[28]

The complaint made by many contemporary feminists is that the emphasis placed on the equality versus difference debate in the 1980s, and the concomitant discussion of relevant difference between men and women (the binary opposites) has caused feminist theorists to fall into the trap of universality and superficiality in relation to what the all- encompassing word 'world' means.[29] One consequence of this error has been the exclusion of many women's voices.

[27] Fineman and McCluskey, *Feminism, Media, and the Law*.
[28] Bartlett, *Feminist Legal Theory*.
[29] Judiasih et al., 'WOMEN, LAW AND POLICY'.

Feminist Legal Theory

Trisha Yearwood says and discuss in Ann Scales Legal Feminism, activism, Lawyering and Legal Theory that "What I call 'feminism' is not a way of thinking confined to persons born female.[30] Rather, this feminism is the concrete analysis of systematic oppressions, which analysis has led to a critique of objectivity in epistemological psychological, and social – as well as legal-terms. There is no "female point of view" nor any "male point of view" corresponding to an individual's membership in a biologically defined group.[31] Rather, there is a socially constructed process that conscripts' people into a gendered way of seeing the world. This process includes not only rites of tenderization for individuals but also habits of thinking that are contingent but powerful. Among those habits is the division of the world into knowing subjects and known objects, that is, the habits of dividing perceptions between those that are subjective and those that are objective.[32]

In the understandable rush to render feminist work acceptable in traditional terms, it is sometimes suggested that feminist lawyer's ought to advertise our insights as the best among competing revivals of the Legal Realism of the 1930s. All outsiders are surely indebted to the Realists for their convincing demonstration that the law could not be described, as the formalists and positivists had hoped, as a scientific enterprise, devoid of moral or political content. The Realists' description of the influence of morality, economics, and politics upon law is the first step in developing an antidote for legal solipsism. In the end, however, Realism was not courageous enough for feminism.[33]

The Realists did not revolutionize the law but only expanded the concept of legal process. The Realists did not press their critique deeply enough; they did not bring home its implications. In the face of their failure, the system has clung even more desperately to objectivity and neutrality. The

[30] Bartlett, *Feminist Legal Theory*.
[31] Ann Scales, *Legal feminism: activism, lawyering, and legal theory,* (New York and London: New York University Press, 2006), h. 82.
[32] Smart, *Feminism and the Power of Law*.
[33] Ann Scales, *Legal feminism: activism, lawyering, and legal theory*, h. 83.

legal feminism emerging in the 1960s began in that liberal mode. It involved challenging the exclusion of women from equal opportunities of all sorts. The thrust of the approach was to argue for neutrality in legal standards, that is, for a legal rule regarding women that "did not take sex into account." That led a group of feminist scholars in the 1970s and '80s—it surely led me[34]—to waste a lot of time bickering about rules and standards in the abstract.

A Better Standard

Why not have an equality standard that focuses on the issues of domination, disadvantage, and disempowerment instead of on the issues of difference? Trisha Yearwood endorses a standard proposed by Professor MacKinnon that she calls the "inequality approach." The test in any challenge should be "whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.[35]

This would not be a hugely radical departure. Back in 1979, when Professor MacKinnon proposed this standard, she identified the extent to which U.S. equality law had essentially already embraced it. To be sure, there was and is a somewhat fractured consciousness about inequality in American law. To me, the encouraging part is that we already have this progressive standard out there on the interpretive turf. it has not completely lost out, and its presence has not caused discernible damage to other ideals that the legal system holds dear. Moreover, other democracies have adopted interpretations

[34]Although Mr. Meese did not actually participate, the Justice Department at the time empaneled a commission to study pornography, which found that there is a connection between pornography exposure and sexual violence. Of course, Anti-pornography feminists had been making that connection for a long time. The alleged alignment was said to be the kiss of death because of conflicting interests in similar legislation: the feminist interest in pornography regulation is to provide civil remedies for pervasive practices that harm women; the right-wing women's interest is supposedly in the perpetration of their own ideas of virtue, both feminine and masculine. Pornography regulation is to them a vehicle for imposing their narrow morality on everyone else. For a great synopsis of the Meese Commission controversy, see Robin West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report," 1987 *American Bar Foundation Research Journal* 681 (1987).

[35]*Ibid.,* Ann Scales, *Legal feminism: activism, lawyering, and legal theory*, h. 93.

of their constitutional guarantees of equality that look a lot like the MacKinnon standard. Those interpretations are confirmation of the practicality of her approach.[36]

Such a standard would not immediately dispose of all recurring problems but would analyze them differently. Consider the problem of stereotyping. The notion of stereotyping connotes various often overlapping problems, including falsification of group characteristics, oversimplification of group characteristics, inattention to individual characteristics, lack of seriousness, and invariance. Even the differences approach could attack stereotyping without difficulty when the challenged practice is based upon an untrue or overbroad generalization. Only the inequality approach, however, can address two other problems of stereotyping: first, the need for a reliable approach to generalizations that are largely true (either because of biology or because of highly successful socialization, what Professor Anthony Appiah calls "normative stereotypes", and second, the need to distinguish between beneficial and burdensome legislation.[37]

In the gender context, the "normative stereotypes" that the differences approach reinforced were often tied to biological differences between men and women. Thereby, the reasons for having antidiscrimination laws have been seen as reasons to allow discrimination. The inequality approach unravels the tautology. Under the inequality approach, different treatment based upon unique physical characteristics would be "among the first to trigger suspicion and scrutiny."

It makes no sense to say that equality is guaranteed only when the sexes are already equal. The issue is not freedom to be treated without regard to sex; the issue is freedom from systematic subordination because of sex. Thus, the inequality approach would reach not only false stereotypes but also stereotypes (such as women's unequal child-rearing responsibilities) that have largely made themselves true through a history of inequality.

[36] Smart, *Feminism and the Power of Law*.
[37] Scales, *Legal Feminism*.

Feminist Legal Scholarship

To be classified as feminist, legal scholarship should be based on women's experience. In it, will briefly discuss what to be the three stages of feminist legal scholarship and will review what impact.

a. **Stage One: Formal Equality and Reproductive Rights**
   The period from 1963 to 1966 is generally cited as the beginning of the modern-day women's movement, sometimes described as the second wave of feminism. In the late 1960s, as the modern women's movement rallied together and began to litigate for women's equality, fewer than 5% of all lawyers were women and fewer than 2% of all law professors were women. Feminist legal scholarship during this period, to extent it existed at all, reflected the goals of the concurrent women's movement. Such scholarship tended to focus on equality in the public sphere and to argue that women should be treated the same as men. Feminist who were concerned with reproductive freedom necessarily had to deal with the ways in which women were different from men. However, much early feminist legal scholarship was written from a view-point that implicitly approved the male norm.[38]
b. **Stage Two: Women Are Different from Men**
   Once women began to be treated like men, people began to notice that women really are not like men. Women are most noticeably not like men when they are pregnant. Stage Two theorists began to develop theories of equality that could account for certain differences between women and men. At minimum, they argued, equality theory should account for the fact that women get pregnant. Some theorists in Stage Two have suggested that women are different from men in way that go beyond biology. Some cultural feminist, women, because they give birth and nurture, tend to be more connected and caring than men.

[38]Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, Berkeley Journal of Gender, Law & Justice, No, 1/Volume 4/Issue 2. h. 197.

c. Stage Three: Postmodernism

Postmodern thought challenges notions such as objectivity and universality. The postmodern "knowing self" is subjective, concrete and particular, constructed through the lived experiences of the subject.[39]

CONCLUSION

Feminists believe that history was written from a male point of view and does not reflect women's role in making history and structuring society. Male-written history has created a bias in the concepts of human nature, gender potential, and social arrangements. The language, logic, and structure of the law are male-created and reinforce male values. By presenting male characteristics as a "norm" and female characteristics as deviation from the "norm" the prevailing conceptions of law reinforce and perpetuate patriarchal power. Feminists challenge the belief that the biological make-up of men and women is so different that certain behaviour can be attributed on the basis of sex. Gender, feminists say, is created socially, not biologically. Sex determines such matters as physical appearance and reproductive capacity, but not psychological, moral, or social traits. Though feminists share common commitments to equality between men and women, feminist jurisprudence is not uniform. There are three major schools of thought within feminist jurisprudence. Traditional, or liberal, feminism asserts that women are just as rational as men and therefore should have equal opportunity to make their own choices. Liberal feminists challenge the assumption of male authority and seek to erase gender-based distinctions recognized by law thus enabling women to compete in the marketplace. Like the liberal feminist school of thought, radical or dominant feminism focuses on inequality. It asserts that men, as a class, have dominated women as a class, creating gender inequality. For radical feminists' gender is a question of power. Radical feminists urge us to abandon traditional approaches that take maleness as their reference point.

[39]*Ibid.,* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, h. 198-199.

They argue that sexual equality must be constructed on the basis of woman's difference from man and not be a mere accommodation of that difference.

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